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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-570

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARAI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY OF INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

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The Briefs in Opposition urge two grounds for opposing grant of Certiorari:

1. that the decision below raises no legal issues but merely involves factual application of well settled principles of law, and

2. that there is no conflict among the circuits because the decision below accords with the enforcement by the District of Columbia Circuit of another Board order, involving longshore contractual provisions on the West Coast on the handling of containers.

Neither of these contentions has merit in the light of the improper and erroneous distortion of this Court's decision in *National Woodwork*. Certiorari is clearly warranted to enable this Court to correct such errant departure from the standards enumerated by this Court, for the following reasons:

A. The Issue Here Is One of Law. The Alleged "Settled Principles" Applied Below Are Contrary To Those Enunciated By This Court in *National Woodwork*.

The Briefs in Opposition seek to minimize the legal issues presented by urging that all that was involved below was a factual determination amply supported by substantial evidence. Yet, these same Briefs admit that the Board's decision did not turn on a resolution of the facts since the findings of fact by the Administrative Law Judge, who upheld the rules as a valid work preservation clause, were not disturbed by the Board "and there is no factual dispute here" (NLRB Brief, p. 3 n. 2). Clearly, what is presented is a legal issue. That issue, which is found in every work preservation case, is the frame of reference of "the work in controversy".

Respondents contend that "in making its assessment the Board *properly concentrated* on the work done in the past at off-pier premises" (NLRB Brief, p. 10) (emphasis added). Inasmuch as this critical starting point was not a correct one, the analyses and conclusions of the Court, which adopted the Board's rationale, are inherently defective. The proper test as mandated by this Court, and followed by the dissent below, is that the focus must be on "the work done in the past by longshoremen" at the piers (A93). Thus, the issue is: what is the proper legal standard by which all work preservation clauses are judged.

To support the Board's position, respondents argue that *any* starting point is proper under the Court's "surround-

ing circumstances" test in *National Woodwork*, 386 U.S. 612 at 644, n. 38. They overlook the instruction of this Court thereat, that in evaluating the objective of the challenged contractual clause, it is necessary to consider, *inter alia*, the remoteness of the threat of displacement *by*—not *of*—the banned product or services. Here, the banned service is the off-pier loading and unloading of ocean cargo into containers supplied by the shipping companies. Those services would eliminate work that, prior to the advent of the innovation of containerization, historically was performed at the piers by the longshoremen. That is the work that the Rules seek to protect and preserve. Similarly, in *National Woodwork*, in testing the validity of the prohibition on the use of pre-cut doors, the Court did not, as the Board did here, divide the work into two different categories, *i.e.*, work on pre-cut doors, and work on non pre-cut doors. Rather, it focused on the work carpenters traditionally performed at the job site. When that was threatened by pre-cut doors, the bargaining unit had the right to protect its work from such displacement.

Moreover, the contention that the economic effect upon outsiders is part of the "surrounding circumstances" which the Board properly took into consideration (Brief of Consolidated, p. 12) would lead to a finding of a violation in every case since, by definition, enforcement of the clause in controversy always results in substantial economic effects on third parties. This contention was rejected by this Court in *National Woodwork* in stating that "however severe the impact of primary activity on neutral employers, it was not thereby transformed into activity with a secondary objective" (386 U.S. at 627).

We urge this Court to accept review to preserve both the basic legal principle of work preservation which has been distorted and effectively jettisoned by the decisions below, and the related "surrounding circumstances" test which has been misapplied below.

B. The District of Columbia Circuit Decision Relied Upon By Respondents, Involving Another Union With a Different Work History and Work Jurisdiction, Has No Application To The Instant Case.

The Briefs in Opposition glibly assert that the decision below maintains consistency in the Circuits, since it is in accord with the decision of the District of Columbia Circuit in *Pacific Maritime Ass'n* v. *Labor Board,* 515 F.2d 1018 (D.C. Cir. 1975), cert. denied, 424 U.S. 942 (1976) (hereinafter *"Cal Cartage"*). That court merely affirmed the Board's decision, 208 N.L.R.B. 994, without any opinion. The basis for the affirmance is not known and can only be conjectured.

It is astonishing that the Respondents find *Cal Cartage* of such significance since (1) it was neither cited nor relied upon by the Second Circuit and (2) the Board's opinion did not even refer to its own prior decision in *Cal Cartage* except for passing tangential reference (A73). Clearly, if that case presented the identical issue as is claimed by the Respondents, surely the Board and the court below would not have ignored it as they did. Only Judge Ordman came to grips with *Cal Cartage*. He found that it presented a completely different approach to containerization by the West Coast longshore union so that its precedential value on the East Coast was "substantially diluted" (A51).

As noted by Judge Ordman, the work history of the relevant longshore bargaining unit in *Cal Cartage* was significantly different than that present in the instant case. See *Ross:* Waterfront Response to Technological Change: A Tale of Two Unions, Labor L. J. July 1970, pp. 397-419 (A15, n. 3). There, the traditional work jurisdiction of the longshoremen at the piers, represented by the International Longshoremen's and Warehousemen's Union ("ILWU"), was limited. They *did not* have exclusive jurisdiction over all the work at the waterfront terminals

as did the ILA on the East Coast. In *Cal Cartage* both ILWU and non-ILWU employees had over the years worked side by side on the piers "preparing merchandise for loading aboard ship" (208 N.L.R.B. at 1003). Here, on the other hand there was a finding that:

> ". . . [*V*]*irtually all solid cargo* moving over the docks in the Port of New York *had for decades been handled on a piece-by-piece basis by longshoremen and employees in related crafts who worked on the docks and were represented by ILA.* Typically, that work included the preparation of cargo for shipment by the making up and loading of cargo on drafts, pallets and boxes for export, and the breaking down of such cargo from incoming ships for delivery to the consignees. *The existence of a tradition that ILA longshoremen and employees in related [ILA] crafts did such work is not essentially challenged.*" (A15) (emphasis added)

Furthermore, in *Cal Cartage* the Board's decision rested upon a clear and unequivocal contractual abandonment of container work by the ILWU in 1961 in exchange for a substantial, $22,000,000 fund. Only in 1970, after a ten-year hiatus, did it reassert a claim to that work. Here, on the other hand, the ILA had not abandoned its right to handle the cargo in consolidated containers at the piers. This was succinctly stated by Judge Ordman as follows:

> "*Certainly, unlike the situation in California Cartage, the instant proceedings do not present a situation where the Union bargained away certain rights in an agreement and, 10 years later, belatedly reasserted them.* In the instant cases ILA . . . never abandoned that jurisdiction." (A50-51) (emphasis added.)[1]

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[1] The Second Circuit agreed with Judge Ordman on this point stating that it was not "impressed" with the Board's abandonment theory (A92).

The Board's decision in *Cal Cartage* is not flawed by the error it committed here, i.e., looking at the work of the non-unit employees rather than the work of the unit employees; for the ILWU longshore unit did not historically have unfettered pier-side jurisdiction over all ocean cargo on the West Coast that ILA longshoremen have had in the Port of New York. That attempt by the ILWU in *Cal Cartage* to acquire such exclusive pier-side jurisdiction was thus completely different than the ILA's attempt here to preserve the jobs its members historically did perform. The Rules challenged here, similar to the prohibition in *National Woodwork,* merely prohibit those shipping companies subject to the ILA-NYSA contract from supplying containers to the employers outside the unit so as to prevent the further erosion of the work of the ILA longshoremen.

Conclusion

For the foregoing reasons it is respectfully submitted that the Briefs in Opposition avoid, rather than address, the arguments of the Petitions. The important and pervasive legal issue urged in the Petitions warrants the attention of this Court.

Respectfully submitted,

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